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No. 06-1287

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IN THE

Supreme Court of the United States

CSX TRANSPORTATION, INC.,

Petitioner,

v.

GEORGIA STATE BOARD OF EQUALIZATION, ET AL.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE TAX FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether, under the federal statute prohibiting state tax discrimination against railroads, 49 U.S.C. § 11501(b)(1), a federal district court determining the "true market value" of railroad property must accept the valuation method chosen by the State.

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BRIEF OF THE TAX FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

The Tax Foundation submits this brief as *amicus curiae* in support of Petitioner in the above-captioned matter.[1]

The Tax Foundation is a non-profit research organization founded in 1937 to educate the public about

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, has made a monetary contribution to the preparation or submission of this brief. Written consent of the Petitioner and Respondent have been obtained and filed with the Clerk of the Court.

sound tax policy. To this end, we disseminate information on taxes and promote tax systems that are simple, fair, and conducive to economic growth. The Tax Foundation works to further this mission by educating the legal community on issues relating to tax law, by explaining tax law concepts to lawmakers and the public in an understandable and relevant manner, and by advocating that judicial decisions on tax law promote principled tax policy. Accordingly, the Tax Foundation has a direct stake in the outcome of this case.

SUMMARY OF ARGUMENT

The Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R Act" or "the Act") allows federal courts to hear challenges to a state's property tax assessment method with regard to railroads. Congress authorized such challenges, when it approved the 4-R Act, not merely to rescue a troubled industry, but also to protect the right of railroads to be free from discriminatory state and local taxation.

The courts below are in error insofar as they held that taxpayers may only challenge the application of an assessment method and not the method itself. This interpretation contravenes the Act's textual command to consider a property's *"true* market value," not just one party's estimation of that value. Such challenges are vital to give effect to the Act.

More broadly, this Court should not insulate assessment methods from challenge where Congress has demonstrated a desire to protect interstate commerce. Ensuring a transparent process, with the goal of determining *"true* market value," is the best way to protect interstate commerce and individual rights, and uphold the text, purpose, and meaning of the 4-R Act.

ARGUMENT

I. TO PROTECT INTERSTATE COMMERCE AND INDIVIDUAL RIGHTS, THE 4-R ACT ALLOWS FEDERAL COURTS TO HEAR CHALLENGES TO A STATE'S USE OF A PARTICULAR TAX ASSESSMENT METHOD.

A. The 4-R Act limited the power of states to tax to discriminate in its tax assessments.

For a number of reasons, American interstate railroads by the 1970's were in "an anemic condition." *United States v. SCRAP*, 412 U.S. 669, 724 (1973) (White, J., dissenting in part). Deterioration in passenger and freight service, and the 1970 bankruptcy of the Penn Central Railroad—the largest corporate bankruptcy in American history at the time—spurred Congress into action. A series of comprehensive federal statutes sought to address the numerous causes of railroads' decline, which included passenger service mandates, calcified rate and regulatory structures, antiquated work rules, and discriminatory state and local property taxes.

State taxation was the focus of Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R Act" or "the Act"), now codified at 49 U.S.C. § 11501 *et seq.* (2002). The Act forbids state or local government action to:

> (1) Assess rail transportation property at a value that has a higher ratio to the *true market value* of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the *true market value* of the other commercial property.

> (2) Levy or collect a tax on an assessment that may not be made under paragraph (1) of this subsection.

49 U.S.C. § 11501(b) (2002) (emphasis added). A railroad subject to such discriminatory taxation is entitled to relief as an exception to the Tax Injunction Act, 28 U.S.C. § 1341. *See* 49 U.S.C. § 11501(c).

Thus, rail transportation property may not be assessed for the purposes of state and local taxation at a higher level than other commercial property in the state, nor may it be taxed at a higher level than other commercial property in the state. Just as a state cannot use different methods that have discriminatory effects, neither can it use one method if it has a discriminatory effect. *See CSX Transportation, Inc. v. State Board of Equalization*, 472 F.3d 1281, 1293 (11th Cir. 2006) (Faye, J., concurring in part and dissenting in part) ("Surely a state could not use one method to assess the market value of railroad property and a different method to assess other commercial and industrial property if such [use] resulted in gross discrimination toward the railroad.").

A contrary interpretation of Section 306 would lead to absurd results. For instance, if a state were to calculate property assessment with an odd but conceivably rational method, such as by the ratio of trees on the land to trees on the land of other assessed properties, or by the property's height above sea level, it should not be immune from challenge under the 4-R Act if discriminatory effects resulted from the use of that method.

The Act therefore must permit challenges to state and local property tax assessment method in certain situations. Although states are less constrained in other regulatory contexts by virtue of federalism, Congress has used its plenary power over interstate commerce to limit states' ability to use any conceivable method of assessing

and taxing rail transportation property, in that such methods may be challenged in federal court.

B. The purpose of the 4-R Act is to protect interstate commerce and the right to be free from discriminatory state taxation.

Congress's purpose in enacting the 4-R Act was not merely to rescue a troubled industry as an end in itself. A goal of federal involvement of the railroad industry is "to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense." 49 U.S.C. § 10101(8). The now resuscitated industry is just as vital today. "Freight railroads are critical to U.S. economic health and global competitiveness. They move approximately 40 percent of our nation's freight . . . and connect businesses with each other across the country and with markets overseas." ASSOCIATION OF AMERICAN RAILROADS, OVERVIEW OF U.S. FREIGHT RAILROADS (Jan. 2007), *available at* http://www.aar.org/PubCommon/Documents/AboutTheIndustry/Overview.pdf. Removing burdens on railroads removes burdens on interstate commerce.

The 4-R Act demonstrates awareness that railroads suffered discriminatory taxation as they struggled to survive. "Unfortunately, interstate carriers, especially railroads, are easy prey for State and local tax assessors. Railroads, oil pipelines, and other interstate carriers are nonvoting, often nonresident, targets for local taxation, and cannot easily remove their right-of-way and terminals." Report of the U.S. Senate Committee on Commerce, *Discriminatory State Taxation of Interstate Carriers*, S. REP. NO. 91-630 at 3. Remedying this discrimination not only unburdened interstate commerce, but also protected the rights of the railroads to be free of

discriminatory treatment. "The committee joins the Interstate Commerce Commission in recommending enactment of this legislation to eliminate the discriminatory tax practices weakening our national transportation system and burdening the Nation's consumers." *Id.*

Federal courts should of course seek to balance the powers of the federal government under the Constitution with the powers of state and local governments under their respective constitutions. But when, as in this case, the Constitution has lodged a power in Congress and that body properly chooses to exercise it in such a way as to limit state and local power, federal courts should not show unqualified deference to the interests of state and local governments. To do otherwise is to turn the Constitution on its head.

C. Barring evidence about a state's specific assessment method contravenes the 4-R Act's purpose and text.

Because the key phrase of the statute is "*true* market value," a determination of whether a state assessment method is discriminatory requires a comparison with the actual, real-world market value of the property in question. Discrimination can therefore be found in effects regardless of intentions. *See, e.g., Dep't. of Revenue v. ACF Indus.*, 510 U.S. 332, 350 (1994) (Stevens, J., dissenting) ("[T]he text of [the 4-R Act] and its evident purposes convince me that Congress intended to bar discrimination by any means. . . .") (internal citation omitted).

Both the trial court and the appellate court below held that taxpayers are confined to challenging only the application of a method rather than the method itself—even if it produces discriminatory tax assessments that gave rise to the Act in the first place. *See CSX Transp.*,

472 F.3d at 1290 ("The district court was not allowed to consider a valuation methodology different from the methodology of the Board."); *CSX Transportation, Inc. v. State Board of Equalization*, 448 F. Supp. 2d 1330, 1342 (N.D. Ga. 2005) ("[T]he court concludes that CSXT cannot challenge the Department's chosen valuation methods in this case.").[2]

The Eleventh Circuit interpretation contravenes the Act's textual command to consider a property's "*true* market value," not just one side's estimation of that value. "The language of the statute is straightforward . . . . If the Railroad can prove that the method used by the state does not result in a fair appraisal of true market value and that the assessed value is in fact at a ratio higher than five percent of the ratio of true market value and assessed value of other commercial and industrial property, it is entitled to relief." *CSX Transp.*, 472 F.3d at 1292-94 (Faye, J., concurring in part and dissenting in part). The statute forbids assessments that result in discrimination, and considering evidence about true market value is a prerequisite to determining whether discrimination has occurred. The court below was not only allowed to consider such evidence, it was obligated to do so.

The Eleventh Circuit and the District Court used an inappropriate level of deference to the state government

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[2] In so holding, the Eleventh Circuit reached a conclusion opposite from two sister circuits. *See Burlington N. R.R. v. Dep't. of Revenue*, 23 F.3d 239, 241 (9th Cir. 1994) (holding that state valuation methods may be successfully challenged by "clear, cogent and convincing evidence"); *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 482 (2d Cir. 1995) (holding that railroads can challenge a state's use of a unique assessment method). *But see Chesapeake W. Ry. v. Forst*, 938 F.2d 528, 531 (4th Cir. 1991) (holding that the 4-R Act is ambiguous and does not authorize challenges to assessment methodologies).

in analyzing CSXT's claim of discriminatory treatment. *See id.* at 1288 ("Important questions of state policy are often intertwined with the selection of a valuation method."); *CSX Transp.*, 448 F. Supp. 2d at 1341 ("As long as the Department's chosen valuation methods are rational and were not chosen for the purpose of discriminating against CSXT, the court will not second guess the Department's choice of methods."). The text and purpose of the statute make clear that Congress intended to show no deference to assessment schemes that resulted in discriminatory effects. "In drafting § 11503 [now § 11501], Congress prohibited discriminatory tax rates and assessment ratios in no uncertain terms, and set forth precise standards for judicial scrutiny of challenged rate and assessment practices." *ACF Indus.*, 510 U.S. at 343. Where a taxpayer sees its property tax bill go up 47 percent in one year by a method change, as happened to CSXT in this case, while other taxpayers have only minimal increases, rational basis review is inappropriate under the 4-R Act.

It must be noted that Georgia's method is not enshrined in statute or regulation. *See CSX Transp.*, 472 F.3d at 1293 fn.1 (Faye, J., concurring in part and dissenting in part) (detailing the ad hoc and variable nature of Georgia property tax assessment). Here, the Eleventh Circuit below declined to allow a challenge to the state method in part because the 4-R Act did not provide a "plain statement" permitting interference with state sovereignty. *See CSX Transp.*, 472 F.3d at 1289 ("The text of the Act does not clearly state that railroads may challenge valuation methodologies. Without that clear statement, the argument of the Railroad fails."). Assuming for the moment that the Act is unclear about authorizing interference with state discriminatory assessment practices, a ruling for the petitioner here would not invalidate any Georgia law or regulation. Since the choice of method was made by an employee of the

Department of Revenue and is not bound by law or regulation, the result of those choices should be given *greater* scrutiny under the terms of the Act, not less.

A finding for petitioner in this case would not dictate to states a particular method to use. The record seems to indicate that all methods are but estimations capable of fine-tuning. *See, e.g., CSX Transp.*, 448 F. Supp. 2d at 1340 ("After eight days of trial, it is apparent to the court that valuation is an art, not a science.") Judges should be presented with all available evidence so as to make an informed decision about whether a given method's calculation of "*true* market value" comports with reality and other methods. States would remain free to select any method that meets this statutory requirement. *See* S. REP. NO. 91-630, at 3 (1969) ("The committee wishes to emphasize that this bill would in no way alter the freedom of a State to tax its taxpayers so long as interstate carriers are accorded equal tax treatment with other taxpayers.").

An essential prerequisite to ensuring that rights under the 4-R Act are guaranteed is ensuring the ability to challenge state tax practices, and present evidence on what method ascertains *true* market value. The courts below here have imposed an "absolute preclusion of any challenge to the methodology used by the state. . . ." *CSX Transp.*, 472 F.3d at 1294 (Faye, J., concurring in part and dissenting in part). Such a holding deprives courts of necessary jurisprudential tools and allows states to burden commerce freely in the face of congressional proscription.

D. This Court should not insulate flawed tax assessment methods from challenge.

Ensuring that the process of developing and administering tax systems is subject to open hearings with full opportunity to comment on proposals is a

fundamental principle of sound tax policy. *See* TAX FOUNDATION, TEN PRINCIPLES OF SOUND TAX POLICY, Nos. 9 and 10, *available at* http://www.taxfoundation.org/files/tfprinciples.pdf. Tax legislation should be based on careful economic analysis and transparent procedures. Permitting criticism and challenge can help ensure neutrality, simplicity, and fairness in our tax system.

Railroads are not alone in being subjected to appraisal and assessment disparities that result in discriminatory taxation. In Florida, out-of-state "snowbirds" that own real property in the state are challenging a bifurcated taxation system that imposes higher obligations on them than on in-state residents. *See, e.g.*, Rafael Gerena-Morales, *Florida Snowbirds Challenge Fairness of Two-Tier Tax*, WALL STREET JOURNAL (May 22, 2006), at A1. In June 2007, the Allegheny County, Pennsylvania property tax assessment system was held to violate the state constitution. *See Pierce v. Allegheny County*, No. GD05-028355, slip op. at iv (Allegheny County Court of Common Pleas Jun. 6, 2007) (holding that the use of base year assessments violates the state constitution's uniformity clause). In his opinion, Judge Wettick exhaustively details appraisal methods used by each state in property tax assessment. *See id.* at 52-89. The overview paints a picture of an "administrative process of levying property taxes [that] varies greatly from state to state and even within states." Gerald Prante, *Property Tax Collections Surged with Housing Boom*, TAX FOUNDATION SPECIAL REPORT NO. 146 (Nov. 2006), at 2, *available at* http://www.taxfoundation.org/research/show/2056.html.

That states and localities have different methods of assessment and rates of tax is not inherently discriminatory. Indeed, it is a valued aspect of federalism that local taxes are administered by local governments. *See, e.g., Allied Stores of Ohio v. Bowers*, 358 U.S. 522,

526 (1959) ("When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the National Government or violating the guaranties of the Federal Constitution, the States have the attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests."). But differences and disparities can cross the line into unlawful discrimination forbidden by the U.S. constitution, state constitutions, and statutes. *See, e.g.*, *id.* at 532 (Brennan, J., joined by Harlan, J., dissenting) ("Because there are 49 States and much of the Nation's commercial activity is carried on by enterprises having contacts with more States than one, a common and continuing problem of constitutional interpretation has been that of adjusting the demands of individual States to regulate and tax these enterprises in light of the multistate nature of our federation."). There are clear limits to the power of the states over individuals, and the 4-R Act is one such limit.

Only by authorizing CSXT and other similarly situated taxpayers the ability to challenge a state's method—and not merely its application—can a court reach a fully-informed decision about *true* market value. Ensuring a transparent process is the best way to protect interstate commerce and individual rights, and uphold the text, purpose, and meaning of the 4-R Act.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully requests that this Court reverse the decision below.

Respectfully submitted,

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